



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:
5720
Ser 14/085
February 28, 2019

Ms. Emma Best
MuckRock News
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Somerville, MA 02144-2516
Email: 56191-21679940@requests.muckrock.com

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-USMC-
2018-008971; FOIA APPEAL DON-NAVY-2019-003458

This letter responds to your FOIA appeal received in our office on January 31, 2019. I interpret your appeal as a challenge to the adequacy of the search conducted by Marine Corps Installations Command, National Capital Region (MCI NCR). In your underlying request, you asked MCI NCR for:

Lists, indices, or other records that describe or enumerate any historical studies produced or commissioned by the agency's historical staff or various offices/subdivisions...

Your appeal is a request for a final agency determination under the FOIA. For the reasons set forth below, I must deny your appeal.

The adequacy of an agency's search for information requested under the FOIA is determined by a "reasonableness" test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). Courts have found agencies satisfy the "reasonableness" test when they properly determine where responsive records are likely to be found and search those locations. *Lechlitter v. Rumsfeld*, 182 F. App'x 113, 115 (3rd Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it determined to be the only ones likely to possess responsive documents (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990))); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55-56 (D.D.C. 2012) (concluding that agency's search was reasonable because agency determined that all responsive records

were located in a particular location created for express purpose of collecting records related to subject of request and searched that location).

Moreover, courts have found that an agency's inability to locate a responsive record does not undermine an otherwise reasonable search. *Moore v. FBI*, 366 F. App'x 659, 661 (7th Cir. 2010) (noting that although agency had years earlier destroyed some potentially responsive records, that fact does not invalidate the search). Additionally, the mere speculation that requested documents exist does not undermine the finding that the agency conducted a reasonable search. *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records."). Finally, the Supreme Court has ruled that the FOIA does not require an agency to create documents in response to a FOIA request. *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 161-162 (1975).

For your underlying request, MCI NCR coordinated their search with individuals at the Marine Corps University who are the custodians for the Marine Corps' online, searchable publication webpage, <https://www.marines.mil/News/Publications/>. In response to your FOIA request, that website was provided to you. Based on this information, I find NHHC's search was reasonable because it was specifically tailored to look in the locations [MCI NCR] "determined to be the only ones likely to possess responsive documents." *Lechliter* at 115. Furthermore, as the Court said in *Moore*, MCI NCR's "inability to locate a responsive record does not undermine an otherwise reasonable search." Finally, as the Supreme Court said in *NLRB*, contrary to your assertion, there is no requirement to create a list or index in response to your FOIA request. While you may be unhappy with the functionality of the searchable publications website provided to you, in the interest of transparency under the FOIA, I am providing you a point of contact at Marine Corps University to reach out to directly to assist you in finding any specific document of interest related to historical studies:

Mr. Paul Weber
Deputy Director, History Division
(703) 432-5058
Paul.weber@usmcu.edu

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the denial of this appeal. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. government and is therefore unable to assist you in this process.

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If you would like to seek dispute resolution services, you have the right to contact the Department of the Navy's FOIA public liaison, Mr. Christopher Julka, at christopher.a.julka@navy.mil or (703) 697-0031, or the Headquarters Marine Corps FOIA Public Liaison, Ms. Sally Hughes, at sally.hughes@usmc.mil or (703) 614-3685.

If you have further questions or concerns for my office, my point of contact is Maj Jim McKeon, USMC, who may be reached at james.mckeon@navy.mil or (202) 685-4596.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. E. Lattin". The signature is written in dark ink and is positioned above the printed name.

G. E. LATTIN
Director
General Litigation Division

Copy to:
USMCU, History Division
MCI NCR
HQMC (ARSF)
DON OCIO